The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: DOD Military Pay and Allowance Committee Action Number 560 - Survivor Benefit Plan - Former Spouse Coverage

File: B-221968

Date: September 28, 1987

DIGEST

1. Amendments made to the Survivor Benefit Plan in 1982 and 1983 gave retired service members the option of voluntarily electing survivor annuity coverage for "a former spouse." A further amendment enacted in 1984 provides that if a retiree agrees in writing to elect annuity coverage for a former spouse and then "fails or refuses" to do so, the retiree nevertheless "shall be deemed to have made such an election." If a retiree is and always has been ineligible to provide annuity coverage for a former spouse under the provisions of the Survivor Benefit Plan, however, the retiree cannot properly be considered to have ever failed or refused to elect such coverage nor can the retiree be "deemed" to have made the election under the terms of the 1984 amendment.

2. The determination of whether a written agreement, entered into prior to the effective date of the applicable law authorizing an election to provide Survivor Benefit Plan annuity coverage for a former spouse, may properly serve as the basis of a "deemed" election under 10 U.S.C. § 1450(f)(3)(A) depends on the terms of the particular agreement. Such determinations must be made on a case-by-case basis. In cases where the written agreement is determined to be effective for purposes of "deeming" an election, if the court order predates the statute, cost should be assessed retroactive to the effective date of the statute, otherwise the effective date is the first day of the first month which begins after the court order.

3. If a retiree voluntarily elects to provide a former spouse Survivor Benefit Plan annuity coverage within 1 year of his divorce, the effective date of the election is the actual date it is made. Alternately, if the retiree fails or refuses to make such voluntary election, the effective date of the "deemed" election is the first day of the month after the court order. Although the former spouse may request the deemed election prior to the expiration of the

1-year period, the deemed election may not be made until the year has expired, in the absence of an affirmative refusal or other event warranting a determination that the retiree "failed or refused" to make the election.

4. If a member dies before the effective date of statutory amendment that would have permitted the member to elect former spouse as Survivor Benefit Plan beneficiary, there can be no deemed election under 10 U.S.C. § 1450(f)(3)(A).

5. If a member has voluntarily agreed to make an election of Survivor Benefit Plan coverage on behalf of his former spouse but fails to do so, and the former spouse requests the deemed election in compliance with 10 U.S.C. § 1450(f)(3)(A), the deemed election on behalf of the former spouse must be recognized. Collection must be made of any funds paid to the current spouse, subject to waiver provisions under 10 U.S.C. § 1453.

6. A court order other than the original decree of divorce, dissolution or annulment may be used as a basis for a deemed election under 10 U.S.C. § 1450(f)(3). A valid legal document from a court of competent jurisdiction which modifies the provisions of previous court orders relating to the subject matter must clearly indicate that the member has voluntarily agreed to provide coverage under the Survivor Benefit Plan for the former spouse.

7. Decisions regarding who may petition a Board for Correction of Military Records are not within the jurisdiction of the General Accounting Office. However, it is noted that pursuant to 10 U.S.C. § 1552, only the "heir or legal representative" of a deceased member has authority to do so. In addition, while 10 U.S.C. § 1552 confers authority to correct a military record in favor of a member, courts have held that it does not confer the authority to correct the record against a member.

8. The "deemed" election in 10 U.S.C. § 1450(f)(3) requires the election be deemed effective on the first day of the first month which begins after the date of the court order. Thus, in the case of a deemed election, the election of an annuity is based on the court order rather than the date of the deemed election and the type of coverage available the date of the court order would be applicable.

DECISION

This action is in response to a request for an advance decision from the Department of Defense Military Pay and

Allowance Committee.1/ The Committee presents several questions concerning implementation of provisions of the Survivor Benefit Plan which allow the Secretary to "deem" elections to participate in the Survivor Benefit Plan at the request of former spouses of members of the uniformed services.

BACKGROUND

The Survivor Benefit Plan, 10 U.S.C. §§ 1447-1455, was established by Congress in 1972 as an income maintenance program for dependents of deceased members of the uniformed services. See Public Law No. 92-425, September 21, 1972, 86 Stat. 706. Under the original legislation, there was no authority for coverage of a former spouse and upon a divorce, a retiree's former spouse generally lost coverage. The Plan originally provided a monthly annuity to be paid to:

> "(1) the eligible widow or widower;
>
> "(2) the surviving dependent children * * *; or
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> "(3) the natural person designated [with an 'insurable interest' in the member] * * *."

See Public Law No. 92-425, September 21, 1972, 86 Stat. 706, 708, codified at 10 U.S.C. § 1450 (1970 ed., Supp. II, superseded). The provision has been modified a number of times, and a brief history of the relevant modifications follows.

Public Law No. 97-252, September 8, 1982, 96 Stat. 718, 730, 735, title X, the Uniformed Services Former Spouses' Protection Act, amended the Survivor Benefit Plan to allow a member thereafter to make a voluntary election to provide an annuity for "a former spouse," at the time the member became eligible to participate in the Plan. Previously, annuity coverage for a former spouse could have been elected only if the former spouse had qualified as a "natural person" having an "insurable interest" in the service member. See, generally, S. Rep. No. 502, 97th Cong., 2d Sess. 5, reprinted in 1982 U.S. Code Cong. & Ad. News 1596, 1599.

The Plan was again amended by Public Law No. 98-94, the Department of Defense Authorization Act, 1984, September 24, 1983, 92 Stat. 652. The general purpose of modifying the

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1/ The request was made by the Honorable John R. Quetsch, Principal Deputy Assistant Secretary of Defense (Comptroller), and has been identified as Committee Action 560.

Plan was to provide eligible members with an additional option under certain conditions. A member who elected into the Plan by designating his spouse when he became eligible and later divorced the spouse, could now elect to designate that former spouse as the Plan beneficiary. The election would have to be made within 1 year of the effective date of the Act (or within 1 year of the divorce if the divorce took place after the passage of the Act). To make such an election the member must provide the appropriate Secretary with a voluntary written election.

The modifications add to and clarify various provisions of the Plan. Subsection 1448(b)(2), added by Public Law No. 98-94, contains the basic authority for electing coverage for a former spouse if the member is married and has a former spouse or is divorced, at the time of initial election under the Plan. This provision also makes clear that, if the member is married or has a dependent child at the time of this election, coverage of a former spouse prevents payment of the annuity to the current spouse. It also states that if the member has more than one former spouse, he must designate which former spouse is being covered.

Subsection 1448(b)(3), which was also added by Public Law No. 98-94, allows a member to change an existing designation under the Plan to provide coverage for a former spouse. If the former spouse entered into the marriage after the member had become eligible to participate in the Plan, this provision requires that the marriage must have lasted at least 1 year or the former spouse must be a parent of issue of that marriage.

The legislative history of Public Law No. 98-94 contains this statement concerning its purpose:

> "The primary purpose of these technical amendments is to clarify the authority of individuals electing to participate in the Plan before the effective date of the Uniformed Services Former Spouses' Protection Act to designate their former spouses as Plan beneficiaries. For example, the amendments would make it clear that a member who elected into the Plan by designating his spouse in 1975 and divorced that spouse in 1980 could now elect to designate his former spouse as a beneficiary under the Plan. He would have to make that election within one year after enactment of this Act. The amendments also would clarify the authority of members who elected into the Plan after enactment of the Former Spouses' Act and provided spouse coverage but who subsequently

> divorced that spouse to then change that election and provide coverage for that former spouse. This election would have to be made within one year of the divorce.
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> "The amendments would keep the Plan closed to individuals who did not participate in the Plan previously--whether by choice or lack of an appropriate beneficiary. Such individuals could not elect into the Plan on behalf of a former spouse (or any other beneficiary) now. The Committee made this choice consciously. It is a choice consistent with the Committee's intent last year when considering the terms of the Uniformed Services Former Spouses' Protection Act. The Committee also believes it is necessary to draw this line to avoid imposing potential substantial additional financial burdens on the Plan." S. Rep. No. 174, 98th Cong., 1st Sess. 255, reprinted in 1983 U.S. Code Cong. & Ad. News 1081, 1145.

Thus, while the amendments provided by Public Law No. 98-94 were designed to facilitate Survivor Benefit Plan annuity elections on behalf of a former spouse, retired service members were not given an unrestricted option to elect former spouse coverage. Rather, those who had entered retirement prior to the effective date of the amendment, September 24, 1983, were given the opportunity to elect former spouse coverage during the following year only under 10 U.S.C. § 1448(b)(3)(A) if they were already participating in the Plan and met the conditions there specified.

After Public Law No. 98-94 was enacted in 1983 it was found that an agreement to provide an annuity to a former spouse could not be enforced even if the retired service member was eligible to elect coverage, since it was up to the member to make the election voluntarily on behalf of his former spouse. It was then concluded that, while participation in the Plan remained a voluntary act of the retiree, since coverage under the Plan could become an item of negotiation in a divorce settlement, a former spouse should be entitled to rely on a written agreement to provide coverage. As a result, Congress passed section 644 of Public Law No. 98-525, October 19, 1984, 98 Stat. 2492, 2548. In discussing the former spouse election under the Plan, the Senate Committee on Armed Services noted:

> "* * * that there is a deficiency in the present provisions which permit members to subvert the basic intent of these provisions. Specifically, in at least one case, a member has agreed in

> writing to designate a former spouse as an SBP beneficiary and has permitted a court to incorporate or ratify the agreement in a court order. The member has then refused to sign the documents utilized by the Defense Department to actually designate that former spouse as beneficiary. In the opinion of the Defense Department, its officials are without authority to enforce the court-ordered agreement without the member taking the additional step of actually electing the former spouse as beneficiary.
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> "The committee believes this type of action is totally contrary to the underlying concepts of the provisions cited above.
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> "Therefore, the committee has recommended further changes to the Survivor Benefit Plan which would provide that in situations like that described, it shall be deemed that the member has elected the former spouse as beneficiary under SBP, if the Secretary concerned receives a request for such action from the former spouse and is provided a court order reflecting the court's ratification, incorporation, or approval of a written agreement by the member to make such an election." See S. Rep. No. 500, 98th Cong., 2d Sess. 222 (1984). See also H.R. Rep. No. 1080 (Conference), 98th Cong., 2d Sess. 301, reprinted in 1984 U.S. Code Cong. & Ad. News 4258, 4280.

Thus, Public Law No. 98-525 was enacted to provide that, if a member had voluntarily agreed in writing to cover a former spouse under the Plan, the agreement was incorporated, ratified or approved by a court order, and the member then refused or failed to make the election as agreed, the former spouse could make a request to the appropriate Secretary within a year of the passage of the Act or the date of the court order, whichever is later, and the Services would "deem" an election to have been made by the member. This amendment to the Plan concerning "deemed" elections was codified in 10 U.S.C. § 1450(f)(3) (Supp. II 1984).

Finally, section 723 of the Department of Defense Authorization Act, 1986, Public Law No. 99-145, November 8, 1985, 99 Stat. 583, 677, placed former spouse coverage in the same category as current spouse coverage. Thus, the member could participate on behalf of a former spouse at the lower rate charged for covering a spouse instead of the high rate charged for coverage on behalf of an individual with an "insurable interest" in the member.

The Department of Defense Military Pay and Allowance Committee has presented eight questions that have arisen concerning these provisions of the Survivor Benefit Plan.

ANALYSIS AND DISCUSSION

(1) Members Retired Before September 24, 1983, Who Were Never Eligible to Elect Annuity Coverage for a Former Spouse

The first question presented by the Committee is:

> "1. 'Open season' provision of PL 98-94 permitted retired members who had spouse coverage to convert to former spouse coverage for a former spouse who was not the member's former spouse at the time of retirement. With respect to deemed elections on behalf of members who were already retired on the effective date of PL 98-94, can we deem elections where the former spouse was not the member's former spouse at retirement and who never was a spouse beneficiary under the Plan due to the fact the member declined spouse coverage at retirement but later elected coverage for a different spouse under the open enrollment granted in PL 97-35? Can we deem an election for someone who was the member's former spouse at time of retirement?"

The discussion in the Committee action provides this explanation concerning the basis for this question:

> "When PL 98-94 was passed Congress granted an open enrollment (section 941(b)) for members who met the requirements of 10 USC 1448(b)(3)(A). However, the statutory requirement for a deemed election, as cited in 10 USC 1450(f)(3)(A), applies to persons described in paragraph (2) or (3) of 10 USC 1448(b). Paragraph (2) describes an eligible member as one who has a former spouse when he became eligible to participate in the Plan. Prior spouse coverage is not required. This is in opposition to paragraph (3) which describes an eligible member as one who is a participant in the Plan with spouse coverage. * * *
>
> "Our question asks how 10 USC 1448(b)(2) and (3), is to be applied to deemed elections. For example: A member was divorced before retirement on 1 September 1980. Since the member was not married when becoming eligible to participate in the Plan, member elected child only coverage.

> Upon passage of Public Law 98-94, the member could not elect coverage for the former spouse because the member did not have spouse coverage and the former spouse was the former spouse the member had when becoming eligible to participate in the Plan. If former spouse coverage can be deemed, it is inequitable because the member could never have made a valid former spouse election himself and cost and coverage would be retroactively assessed in accordance with 10 USC 1450(f)(3)(C)."

Given this explanation, we understand that the question presented generally relates to situations involving a service member (1) who was retired prior to the effective date of Public Law No. 98-94, September 24, 1983; (2) who had previously agreed in writing to elect Survivor Benefit Plan annuity coverage for a former spouse in the event the applicable statutes were amended to permit such an election; and (3) who was eligible to make that election, if at all, only under the provisions of subsection 941(b) of Public Law No. 98-94 within 1 year after September 24, 1983, under 10 U.S.C. § 1448(b)(3)(A) as:

> "(3)(A) A person--
>
> "(i) who is a participant in the Plan and is providing coverage for a spouse or a spouse and child (even though there is no beneficiary eligible for such coverage), and
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> "(ii) who has a former spouse who was not that person's former spouse when he became eligible to participate in the Plan * * *."

Our view is that if the retiree did not meet these conditions and as a consequence was never eligible to elect annuity coverage for a former spouse, there could be no basis to conclude that he had "failed or refused" to make such an election. Hence, there could be no proper basis for determining that such an election should be "deemed" to have been made under the terms of 10 U.S.C. § 1450(f)(3)(A).

It is therefore our further view that if a service member who retired prior to September 24, 1983, never had an opportunity to elect former spousal coverage either under the provisions of the Survivor Benefit Plan in effect prior to that date, or under the provisions of Public Law No. 98-94 during the 1-year enrollment period after that date, then it would be impermissible to "deem" former spouse coverage under 10 U.S.C. § 1450(f)(3).

With respect to the question of whether an election can be deemed for someone who was the member's former spouse at the time of retirement, the answer would depend upon whether the member was ever eligible to provide coverage for the former spouse. Therefore, in the example case provided in the committee action discussion, involving the hypothetical situation of a service member who was divorced before retirement on September 1, 1980, and who was never eligible to elect annuity coverage for the divorced spouse, there would be no basis to "deem" such an election under 10 U.S.C. § 1450(f)(3).

As to the other specific question and the other hypothetical example case presented, that case involves a situation "where the former spouse was not the member's former spouse at retirement and who never was a spouse beneficiary under the Plan due to the fact that the member declined spouse coverage at retirement but later elected coverage for a different spouse under the open enrollment granted in PL 97-35."

Section 212 of Public Law No. 97-35, August 13, 1981, 95 Stat. 357, 383, provided a 1-year "open enrollment period" ending on September 30, 1982, under the Survivor Benefit Plan for service members who had previously been eligible to elect Plan participation but had declined to do so, and we recognize that the example case presented involving the application of Public Law No. 97-35 was hypothetically possible. We also recognize that upon the enactment of Public Law No. 98-94 on September 24, 1983, the member in such hypothetical situation may have been eligible to elect former spouse coverage under 10 U.S.C. § 1448(b)(3)(A) as a person "who is participating in the Plan and is providing coverage for a spouse" and "who has a former spouse who was not that person's former spouse when he became eligible to participate in the Plan." In an actual case, however, it would be necessary to consider the full factual circumstances in order to determine whether a service member who agreed to provide an annuity for a former spouse had "failed or refused" to do so in such a situation, and, therefore, whether there is a basis for determining whether former spouse coverage might properly be "deemed" under 10 U.S.C. § 1450(f)(3).

In summary, it is our view that if a service member who retired before September 24, 1983, is and always has been ineligible to elect annuity coverage for a former spouse under the Survivor Benefit Plan, such member cannot now be "deemed" to have made that election under the provisions of 10 U.S.C. § 1450(f)(3). We recognize, however, that there may be cases in which doubt exists as to whether the member had an opportunity to elect former spouse coverage and then

"failed or refused" to do so, and those cases should be forwarded here for decision on the basis of the full factual record.

(2) Court Orders Issued Prior to the Date the Member Could Elect Former Spouse Coverage

The second question presented is:

> "2. In some cases the date of the court order predates the effective date of the statute authorizing the former spouse election. Can such court orders be used as a basis for a deemed former spouse election? If so, statute says we should recover costs dating back to the date of court order. Is it proper to assess costs retroactive to effective date of court order. Is it proper to assess costs retroactive to effective date of statute (i.e., first date when member could have made election for former spouse)?"

The Committee states that this question relates to cases involving court orders which predate "the effective date of the statute permitting the member to elect former spouse coverage (P.L 97-252 or P.L. 98-94, depending on the member's eligibility to make an election under these statutes)." The Committee notes that a deemed election is contingent upon the former spouse furnishing a copy of the court order which incorporates, ratifies or approves the member's voluntary written agreement to elect coverage. However, it is not clear whether an agreement entered into prior to the effective date of the law providing coverage for former spouses is a valid agreement for the purposes of a deemed election.

The answer to this question must be determined on a case-by-case basis. We point out that the voluntariness of the election by the member to provide coverage is important. While the prior versions of this legislation provided for mandatory coverage of former spouses, the law enacted allows coverage for a former spouse only when the member has voluntarily elected to provide it.

Although nothing in the language of the statute or legislative history specifically precludes deeming an election on the basis of a court order which predates the effective date of the statute, the date of the court order may affect the voluntariness of the election made by the member. For example, prior to 1983, a member could not elect coverage for a former spouse; thus, he clearly could not agree to provide coverage which the law did not provide. Even if he

had unknowingly agreed to provide continued spouse coverage, we cannot say that he made a voluntary agreement to provide former spouse coverage under 10 U.S.C. § 1448. For example, if a member agreed in 1973 to provide continued spouse coverage to his wife upon divorce at the lowest level (at a cost of $12.39 per month) and subsequent amendments to the statute now allow coverage of that former spouse under former spouse annuity at $385.80 per month, we cannot say that he voluntarily agreed to former spouse coverage and that such an agreement may be the basis for a deemed election. It is our view that under those circumstances, the member has voluntarily agreed to provide a limited benefit which the law did not allow him to provide. When the law changed, a member could provide the benefit, but the benefit is different from that which he agreed to provide. Thus, if the election was deemed, the member may be forced to pay for a benefit which he did not agree to provide.

In addition, a court order predating the effective date of the statutory authority in all likelihood would not incorporate a voluntary written agreement to provide former spouse coverage since there was no coverage in existence at the time of the agreement. For example, in Chief Petty Officer Samuel L. Anderson, USN, B-220546, April 7, 1986, we found that language in an agreement between a member and his spouse which required the member to:

> "* * * maintain his military benefits for his entire family which includes insurance, medical, dental and any and all other miscellaneous benefits * * *"

was insufficient to enable us to find that the member had voluntarily agreed to provide former spouse coverage. Thus, vague language in which the member agrees to provide benefits or other annuity for the former spouse or family does not qualify as a voluntary agreement to provide an annuity under the former spouse provision of the Survivor Benefit Plan.

Under some circumstances, however, a court order which predates the statutory authority may be used as a basis for deeming an election. This would be true if the language of the agreement specifically contemplates a change in the law at some future date. If, for example, an agreement provided that in the event the law should change and the member could provide an annuity for a former spouse the member would do so, the predated order might be used as a basis for deeming an election. We have held that retirees can properly obligate themselves to provide annuity coverage to a former spouse at some future time under agreements executed prior

to the enactment of the legislation. In Brigadier General Fred A. Treyz, USAF, Retired, Deceased, 65 Comp. Gen. 134 (1985), a paragraph in the 1980 divorce settlement provided:

> "* * * that in the event Congress shall hereafter enact legislation that would allow the wife to receive any portion of his retirement benefits after his death through a survivor's benefit plan, the husband shall take any and all actions necessary * * *."

In September 1983, Public Law No. 98-94 was enacted. In the Treyz case in December 1983 the member elected coverage for his former spouse. We found that the election was irrevocable and thus an attempt by the current spouse to revoke the election was ineffective. Similarly, if a member who knew legislation which would allow him to provide an annuity for his former spouse was being considered in Congress provided in an agreement that he would elect such coverage if it should become available, it might be used for the basis of a deemed election.

Thus, if the order which predates the effective date of the authorizing statute specifically ratifies, approves or incorporates a voluntary agreement by the member to provide coverage under the Survivor Benefit Plan for the former spouse, and the request for a deemed election is received by the Secretary within the 1-year limitation, it may be used as the basis for an election.

With regard to whether costs should be assessed retroactive to the effective date of the statute or to the date of the court order, it is our view that in cases where the court order predates the statutory authority, costs should be assessed retroactive to the effective date of the statute. While 10 U.S.C. § 1450(f)(3)(C) provides that the election is deemed to have been made effective on the first day of the first month which begins after the court order, under circumstances where the court order preceded the authority which would allow such an election, that provision does not apply. Since the member could not have participated under the Plan or provided this type of former spouse coverage it is unreasonable to assess retroactive cost. Such an application of the Plan would not benefit former spouses and would merely penalize members for having been divorced prior to the enactment of the statutory authority.

(3) Effective Date of an Election Under 10 U.S.C. § 1450(f)(3)

The third question presented is:

> "3. 10 USC 1448 gives member one year from date of divorce to 'convert' from spouse to former spouse coverage. Similarly, former spouse has one year from date of court order to request deemed election. Should we deem election at request of former spouse (and assess costs back to date of court order), or wait until member's one-year option has expired?"

The Committee notes that if a member elects coverage for a former spouse, cost and coverage are based upon the date of receipt of the election. However, if the Secretary deems an election because the member is considered to have failed to make the election, costs and coverage are assessed retroactive to the date of the court order.

The provision of 10 U.S.C. § 1450(f)(3)(C) directs that, "An election deemed to have been made under subparagraph (A) shall become effective on the first day of the month which begins after the date of the court order or filing involved." In view of this provision, the effective date of a "deemed" election cannot be postponed on the basis of the 1-year period granted to retirees to make an election for a former spouse voluntarily after a divorce.

It is our view that the correct answer to this question is that if the retiree voluntarily elects to provide a former spouse annuity coverage under 10 U.S.C. § 1448(b)(3) within 1 year of his divorce, then the effective date of the election is the actual date it was made. Alternately, if the retiree fails or refuses to make such voluntary election and the election is "deemed," then under 10 U.S.C. § 1450(f)(3)(C) the effective date must be considered the first day of the month after the court order. Thus, although the former spouse may request the deemed election prior to the expiration of the 1-year period, the deemed election may not be made until the year has expired, in the absence of an affirmative refusal or other event warranting a determination that the retiree "failed or refused" to make the election in the interim.

(4) Effect of Retiree's Death Before Statutory Amendment Permitting Former Spouse Coverage

The fourth question is:

> "4. Where member dies before effective date of statutory amendment that would have permitted member to elect former spouse as SBP beneficiary, can we deem election?"

If a retiree had never had an opportunity to elect annuity coverage for a former spouse before his death because there was no statutory authorization it cannot be said that he has "failed or refused" to make an election under the terms of 10 U.S.C. § 1450(f)(3)(A). Therefore, if a member dies before the effective date of the statutory amendment that would have permitted the member to elect a former spouse as SBP beneficiary, there can be no deemed election under 10 U.S.C. § 1450(f)(3)(A).

(5) Effect of Retiree's Death Before Former Spouse Requests Deemed Election

The fifth question is:

> "Where member retires and fails or refuses to make an election for a former spouse pursuant to an agreement to do so, but elects spouse coverage instead, and former spouse does not request deemed election until after member's death, must DOD recover annuity amounts paid to current spouse and deem election for former spouse?"

If a member has voluntarily agreed to make the election on behalf of his former spouse but fails to do so, and the former spouse requests the deemed election in compliance with all provisions of the applicable statutes, it appears that the Department of Defense would be required to collect the funds paid to the current spouse and deem an election on behalf of the former spouse.

While such an action may leave the current spouse without income, Congress enacted a provision which clearly states that an election on behalf of a former spouse under 10 U.S.C. § 1448(b)(2) "* * * prevents payment of an annuity to that [current] spouse or child." In addition, 10 U.S.C. § 1448(d)(4) provides that an annuity to a former spouse

shall be provided in preference to an annuity provided under any other provision on account of service of the same member.

We are unaware of any authority which would allow the current spouse under these circumstances to retain the benefits paid to her. Since, under the statute, the deemed election is retroactive to the date of the court order or the effective date of the statutory authority, if applicable, the payments made to the current spouse are erroneous. We note, however, that the current spouse may request waiver of collection of the erroneous payments pursuant to 10 U.S.C. § 1453.

(6) Modification of a Court Order

The sixth question is:

> "6. What kind of modification to a court order would be sufficient to permit a deemed election?"

The Committee has noted that the phrase "court order involved" in 10 U.S.C. § 1450(f)(3)(C) suggests that a court order other than the original decree of divorce, dissolution or annulment can be used as a basis for a deemed former spouse election. Thus, the Committee asks what type of court order is sufficient.

A court order other than the original decree of divorce, dissolution or annulment may be used as a basis for a deemed election. In 10 U.S.C. § 1450(f)(3)(C) a court order is described as "* * * a court order, regular on its face, which incorporates, ratifies or approves the voluntary written agreement." In our view, a modification of a court order must be a valid legal document from a court of competent jurisdiction which modifies the provisions of previous court orders relating to the divorce, dissolution or annulment or agreements between the member and his former spouse and must clearly indicate that the member has voluntarily agreed to provide coverage under the Survivor Benefit Plan for the former spouse.

(7) Correction of Records Under 10 U.S.C. § 1552

The seventh question is:

> "7. Is a former spouse who missed the election deadline permitted to petition the Board of Corrections of Military Records for a deemed election without the member's consent? If not, is he or she permitted to file a petition with the Board after the member's death?"

The Committee notes that pursuant to 10 U.S.C. § 1552 a member or his spouse, parent, heir or legal representative may apply to the Board for correction of a member's record. The Committee asks whether a former spouse may request a change in the member's records to enable the former spouse to receive an annuity from a deemed election, if that former spouse failed to request the deemed election within the 1-year limitation set out in the statute.

The question of who may petition a Board for Correction of Military Records is generally a matter for decision by that Board. We note that pursuant to 10 U.S.C. § 1552 a member or his representative may petition the Board for a correction of his record to correct an error or remove an injustice. More specifically, section 1552(b) provides that the request for correction of military records may be made by the member, his heir or legal representative. Thus, it appears that, regardless of whether the member is alive or has died, unless the former spouse is identified as the member's heir or legal representative, the statute provides no authority which would allow the former spouse to have a correction made. Compare 45 Comp. Gen. 57 (1965), in which we expressed the view that a retired serviceman's widow, who was not a "former spouse" as the result of divorce, could properly act as his "heir or legal representative" in such proceedings.

In addition, while 10 U.S.C. § 1552 confers authority to correct a record in favor of a member, courts have held that it does not confer the authority to correct the record against a member. See Doyle v. U.S., 220 Ct. Cl. 285, 311 (1979), cert. denied 446 U.S. 982. Since a change in the member's record to reflect a deemed election may be against the economic interest of the member or his designated beneficiaries, such a request by a former spouse would generally seem inappropriate.

(8) Effect of Section 723 of Public Law No. 99-145

The eighth and final question presented is:

> "8. Amendment to SBP statute contained in DOD Authorization Act, 1986 (PL 99-145), would place former spouse SBP coverage in same category as spouse coverage. Should date of deemed election or date of court order determine whether coverage is effective under insurable interest category or spouse category?"

The Committee notes that section 723 of the Department of Defense Authorization Act, 1986, Public Law No. 99-145, 99 Stat. 583, places former spouse elections in the same cost and coverage category as a spouse beneficiary if the election is made after the effective date of that section. However, if the election was made prior to the effective date of the section, the former spouse election is in the same cost and coverage category as an election for an individual with an insurable interest.

Since the cost to the member is much higher under the insurable interest provision, section 723 provided a benefit to members who made the election after the effective date of the Act and to those members who could convince their former spouses to concur with such a change. The Committee asks, in the case of deemed elections, whether the date of the deemed election or court order should determine what kind of coverage would be applicable.

While it may result in higher payments by the member, it appears that the date of the court order should be used to determine whether coverage of the spouse is effective under the insurable interest category or the spouse category. Section 723 provides coverage under the spouse category only for members who make the former spouse election after the effective date of the provision. The deemed election provision, found in 10 U.S.C. § 1450(f)(3)(C), requires that the election be deemed effective on the first day of the first month which begins after the date of the court order. Thus, the "election" of an annuity is based on the court order and the type of coverage available at that time.

for Harry R. Van Cleve
Comptroller General
of the United States